UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CLARENCE KETCH,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 97-45-B***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,[1]	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[2]

This Supplemental Security Income ("SSI") and Social Security Disability ("SSD") appeal raises the issue whether the Commissioner erred in determining that the plaintiff is capable of returning to his past relevant work, based on a capacity for medium work. I recommend that the court remand the case for further proceedings.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the

[1]Pursuant to Fed. R. Civ. P. 25(d)(1), Commissioner of Social Security Kenneth S. Apfel is substituted as the defendant in this matter.

[2] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 7, 1997 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth a oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

Administrative Law Judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity since November 6, 1993, Finding 1, Record p. 20; that he suffered from the residuals of a compression fracture of the L-2 vertebral body, had early degenerative changes of the lower and thoracic regions of the spine, and had relative spinal stenosis at the L-3/L-4 level of the spine with a bone spur contacting the right S-1 nerve root, Finding 3, Record p. 20; that he did not suffer from any impairment which met or equaled any of those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 4, Record p. 20; that in consequence of his impairments he was limited to the performance of work activity of a medium exertional level, Finding 7, Record p. 20; that to the extent that his allegations concerning the pain he experienced, his general symptomatology and the functional limitations imposed upon him by his impairments were not consistent with the functional limitations found by the administrative law judge, his allegations were not found to be fully credible and were found to be inconsistent with the objective medical data in the record, his own description of his activities of daily living, and the statements of the "consulting physician," and the plaintiff was found not to suffer from impairments which could reasonably be expected to produce all of the pain and functional limitations of which he complained, Finding 8, Record p. 21; that the plaintiff was able to return to the performance of his past relevant work as a television repairman, Finding 9, Record p. 21; and that the plaintiff had not been under a qualifying disability at any time prior to the date of the decision, Finding 10, Record p. 21. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final decision of the Commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be

supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The plaintiff contends that the administrative law judge erred by relying on the report of Steven J. Badeen, M.D., a consultant to whom the Social Security Administration referred him for evaluation, to the exclusion of a report from Ernesto G. Ballesteros, M.D., a neurologist to whom the plaintiff was referred by his chiropractor some eight months after he was seen by Dr. Badeen and one month before the hearing before the administrative law judge. Each physician saw the plaintiff only once. The administrative law judge did in fact refer to the Ballesteros materials in his decision, found in Exhibit 32 to the hearing materials, Record pp. 13-14, and in this circuit an administrative law judge is not necessarily required to give more weight to a treating physician's report than to reports of other physicians. *Keating v. Secretary of Health & Human Servs*., 848 F.2d 271, 275-76 (1st Cir. 1988).

The guidelines for weighing medical opinions appear in 20 C.F.R. §§ 404.1527 and 416.927. The weight to be accorded an opinion depends on the examining relationship, treating relationship, the degree to which a medical source presents evidence to support an opinion (particularly medical signs and laboratory findings), consistency with the record as a whole, the medical source's specialized expertise, and other factors that would tend to support or contradict an opinion. 20 C.F.R. §§ 404.1527(d), 416.927(d). An administrative law judge may rely on a medical advisor's opinion in the face of contradictory findings. *See Dudley v. Secretary of Health & Human Servs*., 816 F.2d 792, 793 (1st Cir.1987); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 130 (1st Cir. 1981). However, this does not mean that a medical advisor's opinion must be given controlling weight.

The weight given to medical opinions varies with the circumstances. *See Barrientos v. Secretary of Health & Human Servs.*, 820 F.2d 1, 2-3 (1st Cir. 1987) (opinion of treating physician

entitled to no greater weight than that of consulting physician simply because of status); *Rodriguez Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 3 (1st Cir. 1987) (opinion of treating physician is not necessarily entitled to more weight than that of consulting physician; the administrative law judge may rely on a consultative physician's report when it conflicts with other medical evidence). The appropriate weight to be given to the report of Dr. Badeen, the consulting physician or medical advisor, and to the report of Dr. Ballesteros, a treating physician in the sense that he saw the plaintiff at the request of the plaintiff's treating chiropractor, was for the administrative law judge to decide on the basis of the circumstances and the nature of the evidence in the record.

Against this legal background, the plaintiff argues that the failure of the administrative law judge to explain why he accepted the report of Dr. Badeen over that of Dr. Ballesteros necessitates remand. In August 1994 Dr. Badeen found early degenerative changes in the lumbar spine, based on x-ray studies, and concluded that the plaintiff "has mild osteoarthritis but no significant injury that would impair him from working," based on the x-rays and his examination of the plaintiff. Record pp.134-35. In April 1995 Dr. Ballesteros found "advanced degenerative changes with facet arthropathy causing some nerve root compression or cauda equina comporession [sic] syndrome," based solely on his examination of the plaintiff. *Id*. at 184. A subsequent electromyographic study was performed at Dr. Ballesteros's request in May 1995. The physician who interpreted this study was less certain concerning the plaintiff's symptoms: "[A]lthough there is evidence of lumbar radiculopathy either in S1 or S2 . . . I do not think this provides hard evidence of a substantial, acute, ongoing radiculopathy." *Id*. at 188.

Thus, while the reports of Dr. Ballesteros and Dr. Badeen certainly differ in their evaluations of the degree of degenerative changes in the spine, there is room to distinguish the two. Dr. Ballesteros expresses no opinion concerning any limitations on the plaintiff's ability to perform work-related tasks,

while Dr. Badeen finds no significant impairment of his ability to work. Dr. Ballesteros bases his opinion on a CT scan, *id*. at 183, while Dr. Badeen relies on an x-ray, *id*. at 133. The plaintiff argues that the CT scan provides a better basis for evaluation because it was conducted eight months after the x-ray. The administrative law judge specifically adopts some of the CT scan findings and the results of the electromyographic study in his decision. *Id*. at 13-14. Therefore, it is clear that, contrary to the plaintiff's argument, the administrative law judge did not "ignore" the Ballesteros materials.

The plaintiff cites no authority other than 20 C.F.R. § 404.1527(d) in support of his argument that the administrative law judge had a duty to explain why he accepted Dr. Badeen's opinion "over that of" Dr. Ballesteros, and that his failure to do so requires remand. That section of the regulation requires the Commissioner to "evaluate" every medical opinion that is received, and provides: "We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion." I must agree with the plaintiff that the decision in this case does not provide such reasons, or even any direct indication of the weight given to Dr. Ballesteros's opinion.

The Commissioner contended at oral argument that Dr. Ballesteros was not the plaintiff's treating physician. The definition of a treating medical source for purposes of this action is found at 20 C.F.R. §§ 404.1502 and 416.902:

> *Treating source* means your own physician or psychologist who has provided you with medical treatment or evaluation and who has or has had an ongoing treatment relationship with you. Generally, we will consider that you have an ongoing treatment relationship with a physician or psychologist when the medical evidence establishes that you see or have seen the physician or psychologist with a frequency consistent with accepted medical practice for the type of treatment and evaluation required for your medical condition(s). We may consider a physician or psychologist who has treated you only a few times or only after long intervals (e.g., twice a year) to be your treating source if the nature and frequency of the treatment is typical for your condition(s). We will not consider a physician or psychologist to be your treating physician if your relationship with the physician or psychologist is not based on your need for treatment, but solely on your need to obtain a report in support of your claim for disability. In such a case, we will consider the physician or

psychologist to be a consulting physician or psychologist.

An administrative law judge may not reject a treating physician's conclusions unless he explains on the record the reasons for doing so. *Allen v. Bowen*, 881 F.2d 37, 41 (3d Cir. 1989). Here, there is no indication in the record that Dr. Ballesteros was seen only to obtain a report in support of the claim for disability. The plaintiff was referred to Dr. Ballesteros by his chiropractor for evaluation of the need for surgery. Dr. Ballesteros in turn ordered the electromyographic study in order to pursue that evaluation. Record at 51. After receiving the results of that study, Dr. Ballesteros suggested that the plaintiff try conservative treatment for six months and then return to Dr. Ballesteros, who would then decide whether to proceed with surgery. Record at 186. Thus, Dr. Ballesteros prescribed a course of treatment and was a treating physician under the regulatory definition. *See Weiler v. Shalala*, 922 F. Supp. 689, 696 (D. Mass. 1996) (physician who provides course of treatment for claimant's ailment is treating physician).

In the absence of an adequate explanation for the decision not to give Dr. Ballesteros's credible medical findings any weight, a reviewing court cannot determine that the administrative law judge's decision was based on substantial evidence. *Schonewolf v. Callahan*, 972 F. Supp. 277, 286 (D.N.J. 1997). *See also Goatcher v. United States Dep't of Health & Human Servs.*, 52 F.3d 288, 290 (10th Cir. 1995) (failure to give report of treating physician detailed and specific review required by regulation necessitates remand). Accordingly, this case must be remanded for further consideration of the medical evidence.

For the foregoing reasons, I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of November, 1997.

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David M. Cohen
United States Magistrate Judge